Supreme Court, U. S.
FILED
MAY 20 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1414

ARCHIE JAMES SHUMAR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR REVIEW OF AN ORDER OF APRIL 11, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR REVIEW OF AN ORDER OF APRIL 11, 1975

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 11, 1975, in response to the government's Motion For Rehearing, which judgment affirmed petitioner's conviction under Count I of the criminal indictment under which petitioner was charged in the United States District Court for the Southern District of Indiana.

REFERENCE TO OPINIONS BELOW

The District Court did not issue an opinion in this case. The Court of Appeals for the Seventh Circuit issued an un-

published Order, pursuant to Circuit Rule 28, on July 31, 1974, a copy of which Order is appended hereto, as Appendix A. By its opinion of July 31, 1974 the Court of Appeals reversed petitioner's conviction under Count I of the indictment which had been filed against him.

The Court of Appeals entered an Order on April 11, 1975, a copy of which Order is appended hereto, as Appendix B. By the Order of April 11 the Court of Appeals granted the government's Petition For Rehearing, reconsidered its Order of July 31, and affirmed the conviction of petitioner on Count I.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied due process of law by the action of the Court of Appeals in granting the government's Petition For Rehearing and affirming petitioner's conviction, which petition was filed after the expiration of the government's time to petition for rehearing and after the mandate of the Court of Appeals should have issued.

2. Whether Petitioner was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States by reason of being represented by the same trial counsel as his co-defendants, over repeated objections and motions of counsel to withdraw, and over a pro se motion for severance which is not included within the record of proceedings through no fault of petitioner, although the District Court indicated that it would be made part of the record.

3. Whether the evidence was sufficient to support petitioner's conviction of violating 18 U.S.C. § 371, conspiring to violate 18 U.S.C. § 1955.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED

The constitutional provisions, statutory provisions, and rules of procedure involved are set forth in Appendix C.

They are:

(1) The Fifth Amendment to the Constitution of the United States, appearing in Volume 1, United States Code, Page XLVIII;

(2) The Sixth Amendment to the Constitution of the United States, appearing in Volume 1, United States Code, page XLVIII;

(3) Federal Rules of Appellate Procedure, Rule 40, appearing in Volume 7, United States Code, Page 7723-7724 (Title 28, Appendix);

(4) Federal Rules of Appellate Procedure, Rule 41, appearing in Volume 7, United States Code, Page 7724 (Title 28, Appendix);

(5) 18 United States Code § 371, appearing in Volume 4, Page 4190-4191 (1970 Ed.);

(6) 18 United States Code § 1955, appearing in Volume 4, Page 4348 (1970 Ed.) and in Supplement II, Page 393 (1972).

STATEMENT OF THE CASE

On April 25, 1972, Petitioner, together with twenty-nine (29) other individuals, was charged in a three-count indictment returned by a grand jury for the Southern District of Indiana. Count I charged petitioner with a violation of Title 18, United States Code, § 371, conspiracy to violate

Title 18, United States Code, § 1955. Counts II and III of the indictment charged a violation of Title 18, United States Code, § 1955, which relates to certain illegal gambling activities.

Petitioner was convicted under each of the three counts of the indictment, and an appeal was timely filed in the United States Court of Appeals for the Seventh Circuit. On July 31, 1974, the Court of Appeals entered an unpublished Order, which reversed petitioner's conviction under Count I of the indictment, and affirmed petitioner's convictions under Counts II and III of the indictment.[1]

The first question presented for review herein is concerned with the propriety of the acts of the Court of Appeals following its Order of July 31, 1974. A certified copy of the docket sheets of the Court of Appeals is appended hereto, as Appendix D.

Following its Order of July 31 reversing petitioner's conviction on Count I, the Court of Appeals granted the government's Motion For A Stay Of The Mandate on August 20, 1974, for a period of thirty (30) days, which expired on September 20, 1974.

On October 4, 1974, the government filed a document entitled "Motion To Stay Mandate Pending Decision Of *Iannelli v. United States* By The Supreme Court" and, following objections by petitioner, on October 24, 1974 the government filed a document entitled "Amended Motion To Stay Mandate And Extend Time To Petition For Rehearing Pending Decision of *Iannelli v. United States* By The Supreme Court".

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[1] Shumar petitioned for certiorari as to Counts II and III of the indictment, which petition was denied on February 18, 1975. *Shumar v. United States*, No. 74-495, cert. den. — U.S. —, 95 S. Ct. 1120 (February 18, 1975).

On October 29, 1974, the Court of Appeals entered an Order granting the government permission to file a petition for rehearing within fourteen (14) days after the decision of this Court in *Iannelli v. United States*.

On March 25, 1975, this court issued its opinion in *Iannelli v. United States*, — U.S. —, 95 S. Ct. 1284 (1975); on April 4, 1975, the government filed a petition for rehearing, which was granted by the Court of Appeals on April 11, 1975. In response to the government's petition for rehearing, the Court of Appeals reconsidered its original Order reversing petitioner's conviction on Count I, and affirmed petitioner's conviction on Count I.

As to the second and third questions presented for review herein, in the District Court attorney Edward Kelly was retained to represent petitioner together with eighteen (18) other defendants. Fifteen (15) of the other defendants represented by Mr. Kelly chose to enter pleas of guilty to the charges. As a consequence of some of Mr. Kelly's clients entering pleas of guilty, the trial court held a hearing (Tr. 934-962[2]) to discuss with those clients of Mr. Kelly who had not plead guilty the possibility of a conflict of interest between themselves and those clients who had plead guilty and who intended to testify for the government, but who continued to be represented by Mr. Kelly.

At the time of the hearing, the case had been set for trial the following morning, and the trial court made it clear that it proposed to proceed with the trial the following morning. (Tr. 944, 951-952)

At the conclusion of that hearing, Petitioner indicated that he was willing for Mr. Kelly to continue as his counsel. (Tr. 950)

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[2] The Tr. designation throughout refers to the transcript at the Court of Appeals.

The trial commenced with Mr. Kelly representing petitioner and three other defendants. As the government's case in chief was presented at trial it immediately became obvious to petitioner that the relationship between himself and the gambling operation which the government alleged to exist was significantly different from the relationship between the gambling operation and petitioner's co-defendants who were also represented by Mr. Kelly on pleas of not guilty. It appeared to petitioner that while his conduct was beyond the purview of Title 18, United States Code, § 1955, the conduct of his co-defendants, who were shown to be employees of the gambling operation, might constitute a violation of the statute. Petitioner therefore determined that Mr. Kelly could not adequately represent petitioner, together with the co-defendants who were standing trial.

Petitioner moved to be severed from the trial and for successor counsel. Mr. Kelly moved to withdraw as counsel for petitioner. The District Court overruled the motions. (Tr. 769-772) During the remainder of the trial petitioner repeatedly moved the Court to sever him from the trial, and for successor counsel. Each such motion was overruled by the Court. (Tr. 187-189; 394-395)

Petitioner filed a pro se written motion which clearly described the conflict of interest between petitioner and his co-defendants who were standing trial and represented by the same counsel.

Despite the District Court's assurance that the pro se motion would be made part of the record (Tr. 769-772), the docket sheets of the District Court contain no reference to the motion, and it has inexplicably been lost from the record of proceedings.

The evidence presented at the trial tended to show that a Mr. Charles W. Brown conducted a gambling operation, commonly known as a horse booking business, headquartered at 8649 E. 46th Street, Apartment #10, Indianapolis, Indiana. (Tr. 4) Mr. Brown testified that his partner in the gambling operation was Claude W. Clarke (Tr. 6), and that the gambling operation had two employees at that location —William Neal Clark and Joe Sights (Tr. 5).

Mr. Brown also testified that the gambling business operated a casino located on East 10th Street, Indianapolis, Indiana, and that defendants Baird and Brady were salaried poker dealers at the East 10th Street location. (Tr. 137-138)

Specifically as to petitioner, evidence was presented that petitioner placed bets with the gambling operation (Tr. 11) and that a rack (Government Exhibit 30; Tr. 73) was maintained in the office on East 46th Street on which rack petitioner was identified as "No. 7". (Tr. 490:55)

Testimony was presented that Mr. Sights, an employee of the gambling operation, delivered four (4) copies of the Daily Racing Form and six (6) copies of the Illinois Sporting News to petitioner as a convenience or service. (Tr. 484:10) The gambling operation gave petitioner a fifty (50) percent discount so that if he won five hundred dollars ($500) on his bets he would only be paid two hundred fifty dollars ($250) by the gambling operation and if he lost five hundred dollars ($500) on his bets he would only be required to pay two hundred fifty dollars ($250) to the gambling operation. (Tr. 17:88; 18:93, 94; 19:95)

Mr. Brown testified that petitioner was a customer or account of the gambling operation, and was not an employee (Tr. 128-130), Mr. William Clark, who was employed by the gambling operation, testified that petitioner was

only a bettor and nothing else (Tr. 728, 729, 731) and further Mr. Sights, who was an employee of the gambling operation, categorized petitioner as a customer. (Tr. 490)

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of Indiana arose under Title 18, United States Code, § 3231, and under Title 18, United States Code, § 371 and Title 18, United States Code, § 1955.

REASONS FOR ALLOWANCE OF THE WRIT

1. The writ should be allowed as to the first question presented for review for the reason that the Court of Appeals has decided an important question of federal law in regard to belated government petitions for rehearing in criminal cases which has not specifically been settled by this Court, but which should be settled. Furthermore, the writ should be allowed as to the first question presented for review for the reason that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A consideration of the chronology of the proceedings in the Court of Appeals after its opinion of July 31, 1974, is essential to an understanding of the issue raised by the first question presented for review herein. A certified copy of the docket sheets in the Court of Appeals are appended hereto as Appendix D.

The judgment of the Court of Appeals on April 11, 1975 constituted the rejuvenation of an expired right to appeal by the government from a judgment which had become final. Such rejuvenation of an expired government right

to appeal is prohibited by the due process clause of the Constitution, as well as by the Federal Rules of Appellate Procedure.

Following the Court of Appeals opinion of July 31 in which petitioner's conviction on Count I was reversed, the government filed a "Motion To Stay Mandate" on August 17, 1974, seeking a stay of the mandate of the Court of Appeals for thirty (30) days pending a decision by the government as to whether a petition for a writ of certiorari would be filed with this Court. The government did not petition for rehearing at that time, nor did it request an extension of time within which to file a petition for rehearing. Rather, it sought merely a stay of the mandate pending a petition for a writ of certiorari.

The Court of Appeals granted the government's motion on August 20, and stayed the issuance of the mandate for a period of thirty (30) days, which expired on September 20.

The government took no action whatsoever within this thirty (30) day period of time. No petition for rehearing was filed in the Court of Appeals, no request for an extension of time within which to file a petition for rehearing was filed, and no petition for certiorari was filed in this Court by the government.

Rule 40(a), Federal Rules of Appellate Procedure, states in pertinent part that:

> "A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order."

Thus, the government's time to petition for rehearing of the Court's Order of July 31 expired on August 14. On August 14, the government had not petitioned for rehear-

ing, had not requested an extension of time within which to petition for a rehearing, and had not moved to stay the mandate.

Rule 41(a), Federal Rules of Appellate Procedure, states in pertinent part that:

> "The mandate of the Court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order."

The Court of Appeals had stayed the issuance of the mandate for a period of time which expired on September 20, 1974. On that date, the mandate of the Court of Appeals should have issued reversing petitioner's conviction on Count I, and that judgment should have been final from that date forward.

Not until October 4, 1974, did the government file a document which it captioned "Motion To Stay Mandate Pending Decision of *Iannelli v. United States* By The Supreme Court." Still the government did not petition for rehearing in the Court of Appeals, nor did it request an extension of time within which to petition for a rehearing.

Petitioner objected to the government's motion of October 4, urging that it was untimely. By Order dated October 17, the Court of Appeals required the government to file an answer to petitioner's objections by October 23, 1974.

Again, the government failed to comply with the deadlines imposed upon it by the Orders of the Court of Appeals, and not until October 24 did it file a document entitled "Answer To Response Of Defendant-Appellant Shumar" and a second document entitled "Amended Motion To Stay Mandate And Extend Time To Petition For Rehearing Pending Decision of *Iannelli v. United States* By The Supreme Court."

October 24, 1975, was the first time the government asked the Court of Appeals to extend the time to petition for a rehearing. October 24 was some sixty-three (63) days after the Court of Appeals Order reversing petitioner's conviction on Count I, and was some thirty-two (32) days after the stay of the mandate had expired.

On October 29, 1974, the Court of Appeals granted the government an extension of time until fourteen (14) days after the decision of this Court in *Iannelli v. United States* within which to file a petition for rehearing. Petitioner contends that that Order of October 29 was in excess of the Court of Appeals authority, was in violation of petitioner's rights to due process of law, and was in violation of the requirements imposed by the Federal Rules of Appellate Procedure upon the government, as well as upon other parties litigant.

If the government had wished this case to be controlled by ultimate decision of this Court in *Iannelli v. United States*, — U.S. —; 95 S. Ct. 1284 (1975), the government could have exercised its statutory right to petition for certiorari in this case, and could have requested this Court to join this case with its consideration of *Iannelli*. The government declined to petition for certiorari in this case for its own reasons.

The government could have filed a timely motion for rehearing in the Court of Appeals, but again declined to do so.

The government could have renewed its motion to stay mandate upon the expiration of the thirty (30) day stay granted by the Court of Appeals on August 20, but again declined to do so for its own reasons.

Petitioner recognizes that in two cases this Court has approved the government's filing of a petition for a re-

hearing in a criminal case. However, in each of those cases the government's petition was *timely* filed and the mandate of the Court of Appeals had not issued.

For example, in *United States v. Healy*, 376 U.S. 75 (1964) defendants in a criminal case contended that absent specific authorization by statute or rule, the filing of a petition for rehearing by the government in a criminal case **could not extend the time for appeal. This Court held that:**

> **"It is undisputed that the notice of appeal was filed by the United States within 30 days from the denial of the petition for rehearing, although not within 30 days of the original entry of judgment. *Since the petition for rehearing was filed within 30 days of the judgment, we are not faced with an attempt to rejuvenate an extinguished right to appeal.* Cf. *Allegrucci v. United States*, 372 U.S. 954. The question, therefore, is simply whether in a criminal case a *timely* petition for rehearing by the government *filed within the permissible time for appeal* renders the judgment not final for purposes of appeal until the court disposes of the petition . . ." *Healy, supra*, at 77-78 (emphasis supplied).**

See also, *Forman v. United States*, 361 U.S. 416 (1960).

In neither of those cases did this Court approve the result which has occurred in this case. Indeed, the Court of Appeals action in this case constitutes the action which this Court has implicitly forbidden in *Healy, supra*,—the rejuvenation of an extinguished right of the government to appeal in a criminal case.

Once a mandate has been issued by a Court of Appeals the Court's control over the judgment comes to an end, unless there is a recall of the mandate. *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962). Only circumstances in which there would be a great injustice would justify a Court of Appeals recall of the mandate; the recall of a mandate once

issued is sparingly exercised. *Gradsky v. United States*, 376 F.2d 993 (5th Cir. 1967); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973). The government did not even file a motion to recall the mandate.

The only conceivable rationale upon which the Court of Appeals could have determined on April 11, 1975, that its Order of July 31, 1974 was not final and was subject to rehearing on petition of the government, would be that petitioner docketed a timely petition for certiorari as to Counts II and III of the indictment on October 29, 1974. *Shumar v. United States*, cert. den. — U.S. —, 95 S. Ct. 1120 (February 18, 1975).

Petitioner would note, however, that on October 18 he filed a motion in the Court of Appeals to stay the mandate as to Counts II and III pending the petition for certiorari. The motion to stay the mandate as to Counts II and III was denied by the Court of Appeals on October 21. Thus, on October 21, the mandate of the Court of Appeals was not stayed as to either Count I or Counts II and III, no party was within its permissible time to petition for rehearing, and indeed no petition for rehearing was then pending before the Court of Appeals by any party. The government's right to petition for rehearing as to Count I was not rejuvenated by the Court of Appeals until October 29.

It would violate petitioner's rights to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States to justify the government's belated petition for rehearing on Count I, or the Court of Appeals reconsideration of its earlier Order as to Count I, upon the basis that petitioner kept the appeal alive, and prevented it from becoming final, by petitioning for certiorari on Counts II and III.

This Court held in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that courts are without the right to put a price on a defendant's appeal, and that a defendant's exercise of a right of appeal must be free and unfettered. *North Carolina v. Pearce*, at 724.

North Carolina v. Pearce, supra, dealt specifically with the situation in which a defendant succeeded in having a conviction reversed on appeal, but is given a harsher sentence on retrial and reconviction than was imposed on the original conviction. However, the analogy between that circumstance and the circumstance in which petitioner now finds himself is very close.

Petitioner ought not to have been penalized by having the finality of the Court of Appeals decision on Count I destroyed merely because he exercised his statutory right to petition for certiorari on Counts II and III.

18 United States Code, § 3731 provides the only authority for the government to appeal any criminal case. Although the statute is not directly on point in that the petitioner, not the government originally appealed to the Court of Appeals from the District Court judgment herein, the judicial attitude toward government appeals in criminal cases expressed in cases decided under 18 U.S.C. § 3731 is persuasive as to the facts presented herein.

A government petition for rehearing of a Court of Appeals judgment which has reversed a criminal conviction has the same effect as if the government were originally appealing the dismissal of an indictment. In either case the government challenges a judicial determination that the indictment was legally insufficient.

This Court, as well as the Court of Appeals for the Seventh Circuit, has consistently held that appeals by the government in criminal cases are exceptional, and are not

favored. 18 U.S.C. § 3731 has been strictly construed against any right on the part of the government to appeal in criminal cases. *Will v. United States*, 389 U.S. 90 (1967); *United States v. Ponto*, 454 F.2d 647, 657 (7th Cir. 1971).

There exists no express statutory authorization whatsoever for the government's petition for rehearing belatedly filed in the Court of Appeals after the Court of Appeals judgment of July 31 had become final by the passage of time.

The action of the Court of Appeals in rejuvenating an expired right of the government to appeal and in reconsidering its judgment on Count I after that judgment had become final is so fundamentally unfair to petitioner as to constitute a deprivation of due process of law, and such action departs so far from the accepted and usual course of judicial proceedings in criminal actions, including compliance with the Federal Rules of Appellate Procedure, as to call for an exercise of this Court's power of supervision over the Courts of Appeal.

2. The writ should be allowed as to the second question presented for review for the reason that the Court of Appeals determination that petitioner waived his right to the effective assistance of counsel is confliet with the appropriate standards established by this Court in *Glasser v. United States*, 315 U.S. 60 (1942), and for the further reason that through no fault of petitioner crucial documents filed at trial do not appear as part of the record of the proceedings in this actio

Although the Court of Appeals did not discuss the conflict of interest issue in its Order of April 11, 1975, that issue is as relevant to the judgment on Count I of the indictment as it was to Counts II and III of the indictment. In its earlier Order of July 31, 1974 the Court of Appeals

discussed, but rejected, petitioner's argument that he was deprived of the effective assistance of counsel over his objection.

In Count I, petitioner was charged with a violation of 18 United States Code, § 371, conspiracy to violate Title 18, United States Code, § 1955. A preliminary determination as to the intended scope and purview of Title 18, United States Code, § 1955 is crucial to an explanation of the reason why petitioner contends that he was denied the effective assistance of counsel.

The statute was enacted as part of Title VIII of the Organized Crime Control Act of 1970, Pub. L. 91-452. In *United States v. Harris*, 460 F.2d 1041 (1972), the Court of Appeals for the Fifth Circuit concluded that the statute was intended to apply to employees, such as watchmen and dealers, but was not intended to include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

The Second Circuit has held that the statute was not intended to include customers of the illegal gambling operation, *United States v. Becker*, 461 F.2d 230 (1972), and the Fourth Circuit has recognized that the statute was not intended to reach a customer or a mere bettor. *United States v. Bobo*, 477 F.2d 974 (1973).

Petitioner urges this Court to adopt the uniform determination of the Courts of Appeal that a customer or mere bettor in a gambling operation is not included within the purview of Title 18, United States Code, § 1955, although employees such as watchmen and dealers may be included. *United States v. Hunter*, 478 F.2d 1019 (7th Cir. 1973); *United States v. Riehl*, 460 F.2d 454 (3rd Cir. 1972).

In considering circumstances in which a defendant was required to be represented by the same counsel as his co-

defendant, this Court stated that the "assistance of counsel" guaranteed by the Sixth Amendment "contemplates that such assistance be untrammeled and unimpaired by court order requiring that one lawyer shall simultaneously represent conflicting interests." This Court determined that:

> "Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made,"

thus establishing the proper standard to be whether the representation of counsel was "as effective as it might have been" if counsel had not been required to represent different interests.

Glasser, supra, further held that the right to effective assistance of counsel is too fundamental and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As urged under the third question presented for review, Petitioner does not believe that the evidence was sufficint to convict him of a violation of the statute. Even assuming arguendo that the evidence was sufficient, it was at best marginal. Thus, the Court of Appeals ought to have taken cognizance of this Court's statement in *Glasser* that:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scale of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." *Glasser*, at 67.

The prejudicial conflict of interest faced by petitioner was that Mr. Kelly represented defendants standing trial who were shown by the testimony of the first witness, Mr. Charles W. Brown, to be directly employed by the gambling operation, while also attempting to represent petitioner who was not shown to be employed. Mr. Kelly was impeded from emphasizing testimony showing petitioner's relationship to the gambling operation to be that of a customer, and from emphasizing that point to the jury in argument, because to do so would at the same time emphasize the close connection of his other clients to the gambling operation. See, *People v. Donahue*, 200 Cal.App. 2d 17, 19 Cal. Rptr. 454, 462 (1962).

Such a distinction as to the weight of the evidence between co-defendants represented by single counsel may not be of such importance if the indictment charges a more traditional criminal offense such as bank robbery or mail fraud. However, as discussed *supra*, the statute under which petitioner and his co-defendants were charged is a highly technical statute, specifically drafted so as not to reach persons who participate in an illegal gambling activity by placing a bet, although reaching street level employes of a gambling operation such as doormen or runners. *United States v. Harris, supra.*

Faced with the necessity for demonstrating such close distinctions, petitioner was entitled to independent counsel who could argue vociferously for petitioner and petitioner alone. Without intending any criticism of Mr. Kelly, he simply was not able to fully devote his attentions to petitioner's particular circumstances because the activities of his various clients fell on both sides of the close and technical line of legality drawn by the statute. Mr. Kelly so indicated by moving to withdraw as counsel for petitioner. (Tr. 769-772)

Two recent Court of Appeals decisions demonstrate the error of the Court of Appeals judgment in this case, and illustrate the conflict faced by petitioner. In *United States v. Marshall*, 488 F.2d 1169 (9th Cir. 1973) the connection of the defendant Marshall to the conspiracy which was charged was substantially less than that of his co-defendants, one of whom was represented by the same counsel as Marshall. The Court found that the dual counsel had slighted Marshall's defense for that of his co-defendant. The record disclosed no effort on the part of the dual counsel to demonstrate to the jury the defendant Marshall's lack of connection to the conspiracy, just as the record in this case demonstrates little effort on the part of Mr. Kelly to demonstrate petitioner's precise relationship to the gambling operation.

The Court in *Marshall, supra*, concluded that the defendant had been denied the effective assistance of counsel, reversing and remanding with directions.

Similarly, in *Holland v. Henderson*, 460 F.2d 978 (1972) the Fifth Circuit found that the defendant Holland was denied the right to effective cross-examination of government witnesses by reason of his counsel also representing his co-defendant. The Court concluded that "the duality of the representation afforded Holland was nothing more than the pro forma entry of an appearance as counsel."

Both *United States v. Marshall, supra*, and *Holland v. Henderson, supra*, support the proposition that dual representation by retained counsel can deny a defendant the effective assistance of counsel as can dual representation by appointed counsel.

The Court of Appeals Order justified the dual representation of counsel by finding that petitioner waived his right to independent counsel, at the hearing held by the District Court before trial began.

Yet, as *Glasser*, *supra*, instructs in these circumstances, the courts must "indulge every reasonable presumption against the waiver of fundamental rights." The District Court had an affirmative obligation to insure that petitioner had in fact intelligently and knowingly waived his right to retain successor counsel, in view of the peculiar posture of petitioner vis-a-vis has co-defendants represented by Mr. Kelly. *Campbell v. United States*, 352 F.2d 359 (DC Cir. 1965).

At the hearing held by the District Court, the only conflict of interest explained to petitioner or discussed by the Court was the possibility of a conflict between defendants pleading guilty represented by Mr. Kelly and defendants pleading not guilty represented by Mr. Kelly. There is no showing in the record that petitioner was in any manner made aware of the potentiality, and indeed the actuality, of a conflict between himself and his co-defendants who plead not guilty and were represented by Mr. Kelly. This conflict faced petitioner only, and did not affect his co-defendants. Court of Appeals treated petitioner's argument together with that of his co-appellants, apparently not recognizing the precise conflict of interest which petitioner felt so acutely after the testimony of the first witness at trial.

The decision of the Fifth Circuit in *Holland v. Henderson*, *supra*, is also instructive on the question of a defendant's knowing and intelligent waiver of independent counsel. The Court there stated as follows:

> "A defendant may knowingly waive his right to separate counsel just as he may knowingly waive the assistance of any counsel, but where an attorney undertakes joint representation and foresees, or should have foreseen, conflicting duties to his clients, he *must* suggest separate counsel and make a sufficiently full disclosure

> of the conflict that his clients may knowingly waive their right to counsel."

The record does not show that Mr. Kelly made any attempt to advise petitioner, before trial, as to the possibility of a conflict between petitioner and Mr. Kelly's other clients who were going to trial on pleas of not guilty. The record does demonstrate (Tr. 767-772) that Mr. Kelly moved to withdraw as counsel for petitioner during the trial as a result of his apprehended conflict of interest. His motion was denied by the trial court.

Petitioner should not have been held to have knowingly waived his right to separate counsel when the facts giving rise to the conflict of interest on the part of dual counsel were not brought to his attention.

Despite the statement of the Court of Appeals to the contrary (Court of Appeals Order, page 4) petitioner does not urge that ipso facto there was a conflict of interest because Mr. Kelly represented four (4) defendants at trial. Rather, petitioner urges that there was a conflict because of the technical nature of the statute and because of the substantially different relationship between himself and the gambling operation vis-a-vis his co-defendants and the gambling operation.

The transcript reveals no attempt by Mr. Kelly to distinguish petitioner as a mere customer or bettor from Kelly's other clients, as to whom there was considerable evidence of employment by the gambling operation. Petitioner felt compelled to attempt to argue his case to the jury personally to demonstrate, as Kelly could not, his unique relationship to the gambling operation. (Court of Appeals Order of July 31, page 7) Petitioner's felt necessity of making a personal argument, and the trial court's willingness to allow him to do so, should of themselves

demonstrate sufficiently the existence of a conflict of interest to entitle petitioner to issuance of the writ. Constitutional guarantees of the effective assistance of counsel cannot be met by requiring, or allowing, a criminal defendant to represent himself when he has repeatedly requested counsel, and when his current counsel has repeatedly moved to withdraw by reason of a conflict of interest.

See generally, Conflict of Interests in Criminal Proceedings, 23 Arkansas Law Review 250 (1969).

Furthermore, through no fault of petitioner, the Court of Appeals lacked the benefit of a pleading filed by petitioner at trial. Shumar filed a pro se written motion for a severance during the trial, specifically describing the conflict of interest which had become apparent to him after the commencement of the trial and which was unique to Shumar. That motion would demonstrate that Shumar was not attempting to revive an issue which he had waived, and that he was not seeking a severance merely as a matter of trial tactics or strategy, but rather from a studied determination that he could not receive the effective assistance of counsel from the same attorney who represented his co-defendants on pleas of not guilty.

The District Court indicated that the pro se motion would be made part of the record, but inexplicably the docket sheets of the District Court make no reference to the pro se motion, and it is *not* part of the record at the Court of Appeals or as filed in this Court. The following colloquy took place at trial as to petitioner's pro se motion:

"THE COURT: Mr. Kelly.

MR. KELLY: During the recess, sir, my client, Archie J. Shumar, gave me two pieces of paper on which he has written a motion per se.

I will now file it with the Court.

THE COURT: Let me see the matter, first.

(Whereupon Mr. Kelly tendered a document to the Court.)

THE COURT: The Court acknowledges a receipt of the communication from the Defendant Archie J. Shumar.

This communication will be made a part of the record in this proceeding. The trial will continue.

The Court will consider whether there is any ruling necessary on this matter. The Court will take such action accordingly.

MR. KELLY: Your Honor, may the matter be file marked?

Your Honor, this is a motion which the defendant has asked me to file in behalf of his defense.

THE COURT: I think that is an insignificant thing, Mr. Kelly.

I say that the matter will be placed in the record. The Deputy Clerk is not here at this moment. However, I would see no reason not to put a file stamp on it when he returns.

MR. KELLY: I move that the document, the document that I have handed to the Court, be file marked, sir?

THE COURT: It will be.

MR. KELLY: I have a motion to make?

THE COURT: You may make your motion.

MR. KELLY: In light of the document which I have handed to the Court, and the Court has told me it will be file marked and made a permanent part of this record—

THE COURT: It will be file marked.

MR. KELLY: I believe that it is incumbent upon me to orally renew my motion heretofore made, sir, to withdraw now only with respect to Archie J. Shumar.

Your Honor, this is by reason of the alleged conflict of interest between my representation and Mr. Shumar. Your Honor, this would be in order that I may take part and represent Mr. Clarke, Mr. Baird and Mr. Brady.

Your Honor, also for the reasons set forth in my written motion on this subject and filed heretofore in this cause of action.

THE COURT: The Court overrules your motion, Mr. Kelly.

The Court does not grant your motion to withdraw as counsel for Mr. Shumar.

The Court will at this time announce to Mr. Shumar: Mr. Shumar, you were instructed previously that you had an opportunity to hire substitute counsel, or additional counsel.

The Court at this time will give you permission, during the noon hour or during any time in the rest of these proceedings, to secure additional counsel to come in here and sit in this case with you.

This case will continue as outlined.

You will continue to be a defendant in this cause of action, and Mr. Kelly will continue to be your lawyer.

Mr. Shumar, you may bring in additional counsel if you desire.

THE COURT: Bailiff, you may bring in the jury." (Tr. 769-772)

Neither petitioner nor his counsel pretend to know the whereabouts of the pro se motion, nor why it not now available as a part of the record. After his pro se motion was filed and denied, petitioner did his best to orally ex-

plain to the District Court the reason that he felt he was denied the effective assistance of counsel. (Tr. 187-189)

Without the benefit of the written pro se motion which was ordered to be made part of the record, but which is not part of the record, the Court of Appeals lacked a significant part of the proceedings at trial to determine whether the conflict of interest issue was only one of trial tactics and whether it had been waived, or whether the conflict did in fact interfere with petitioner's right to the effective assistance of counsel.

3. Sufficiency of the evidence. Petitioner urges the Court to allow the writ on the third question presented for review, although this Court does not frequently consider matters of sufficiency of evidence, in view of the novelty and technical nature of Title 18, United States Code, § 1955, and in view of the need of a nationally uniform interpretation of the purview of the statute.

Although the Court of Appeals did not specifically discuss the sufficiency of the evidence in its Order of April 11, 1975, it had discussed that issue in its Order of July 31, 1974 on Counts II and III of the indictment. The issue had been raised in the Court of Appeals by petitioner as to Count I of the indictment as well.

Petitioner recognizes the appropriate standard for review of the sufficiency of the evidence to be that a conviction will be sustained if there is substantial evidence, taking the view most favorable to the government, to support the findings of guilty. *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973). Applying that standard to the facts at bar, petitioner asserts that in view of the legislative history and intended scope of Title 18, United States Code, § 1955 the evidence was not sufficient to convict. Petitioner believes that his conviction was affirmed by the Court of Appeals

based upon unsupported and unwarranted assumptions of fact, which had also been entertained by the government and by the District Court judge.

The Court of Appeals found the evidence to be sufficient to support petitioner's conviction upon an analysis that petitioner had engaged in the practice of laying off bets with the gambling operation. (Court of Appeals Order of July 31, page 6) A lay off bet occurs when a bookmaker has accepted a bet in an amount which he feels he cannot personally cover, and then transfers all or part of that bet to a second bookmaker or bookmaking operation, such as the gambling operation shown to exist in this case. Cf., *United States v. Bobo, supra.* Petitioner agrees that he placed bets with the gambling operation, but asserts that the bets were his own personal bets, and that there is no substantial evidence in the record to indicate that the bets were in the nature of lay off bets.

As set out in the statement of the case, supra, the evidence tended to show that a Mr. Brown and his partner, a Mr. Clarke, owned and operated the gambling operation, and employed a Mr. William Clark and a Mr. Sights at the bookmaking location. (Tr. 4-5)

Owner Brown testified that petitioner was a customer or account of the gambling operation, and was not an employee. (Tr. 128-130) Employee Clark testified that Petitioner was only a bettor and nothing else. (Tr. 728-729, 731) Employee Sights categorized petitioner as a customer. (Tr. 490)

Partner Clarke was asked the following question and gave the following answer:

> "Q. Mr. Clarke, would you classify Mr. Shumar as only a bettor, nothing else, in the Brown operation?
>
> A. As a bettor." (Tr. 729)

If petitioner was in fact laying off bets, it would be expected that the owners and employees of the gambling operation would have been aware of the nature of his business, and would have so testified. Their testimony was not uncooperative to the government in other regards. Under the language of the statute, petitioner must be shown to have "conducted" the operation. No suggestion has been made by the government that petitioner financed, managed, supervised, directed or owned all or any part of the gambling operation, which are the other qualifying adjectives of the statute.

It would be a strange situation indeed for the owners of a business to not even know who was "conducting" their operation.

The bulk of the other evidence at trial consisted of tape recordings of incoming and outgoing telephone calls to the headquarters of the gambling operation on East 46th Street. (Tr. 295-308) Selected conversations from these tapes were played by the government at trial. However, the only apparent reference to petitioner in any of these conversations played in Court appears at Tr. 374, a conversation taking place on March 28, 1972. Even that reference to petitioner does not indicate the substance of the conversation, nor whether it was an incoming or outgoing call, much less whether a lay off bet or a personal bet was being placed.

The government, the District Court Judge (Tr. 508-509) and the Court of Appeals (Court of Appeals Order of July 31, page 6) have all entertained the assumption that petitioner was in fact placing lay off bets. Nonetheless, petitioner believes that even taking the view of the evidence most favorable to the government, there is no substantial evidence of his placing lay off bets.

The evidence relied upon by the Court of Appeals to show that petitioner placed lay off bets (Court of Appeals Order of July 31, page 6, last paragraph and cont. on page 7) is equally consistent with the fact of placing personal bets as with placing lay off bets.

The substance of the telephone calls referred to by the Court of Appeals has not been shown. As to petitioner's identification as "7" on a wooden rack maintained by the gambling operation, government witness Sights, who was employed by the gambling operation, testified that petitioner, along with all of the other persons whose names were listed on the rack, were customers and that the rack was used to keep track of bets. (Tr. 490) The rack was not used solely for lay off bets.

Sights similarly testified that racing forms were delivered to petitioner merely as a convenience, and that anyone could purchase copies of those forms at local newsstands in Indianapolis. (Tr. 498, 505)

The fifty (50) percent discount allowed petitioner by the gambling operation was not substantially different from that offered to other bettors, many of whom were not indicted. (Brown testimony, Tr. 129-130; Clarke testimony, Tr. 619) It amounted to a volume discount to petitioner, and not a commission. There was no evidence that petitioner operated as a salesman for the gambling operation, or that he received any more or less money as the gambling operation expanded or contracted.

Petitioner was not shown to have shared in the profits of the gambling operation in any way other than by the placing of personal bets which happened to win, he was not shown to have supervised or directed the employees of the gambling operation, he was not shown to have made any attempt to find new business or customers for the operation, and he paid no part of the expenses or overhead of the operation. The evidence shows only that petitioner placed bets with the operation as a customer, and such conduct simply does not fall within the reach of 18 U.S.C. § 1955 or of 18 U.S.C. § 371. *United States v. Hunter, supra*; *United States v. Becker, supra.*

CONCLUSION

It is respectfully submitted that certiorari should be granted as to each of the three questions presented for review.

The first question presents a flagrant attempt by the government, sanctioned by the Court of Appeals, to create its own rules of procedure, to disregard rules of judicial administration imposed upon other parties litigant, and to rejuvenate a right to petition for rehearing which had expired by reason of the government's own laxity. A criminal defendant seeking to belatedly petition for rehearing of his conviction in a Court of Appeals would be summarily rejected. No different fate should have been accorded the government.

As to the second issue presented for review, petitioner was denied the effective assistance of counsel because his attorney represented co-defendants standing for trial whose relationship with the gambling operation was substantially more intimate than that of petitioner. To emphasize that petitioner was not an employee of the gambling operation would have forced his counsel to emphasize the close connection of his other clients.

Petitioner did not waive the issue of conflict of interest created by his counsel's representation of other defendants standing trial, and the pro se motion for a severance which would have demonstrated his failure to waive the conflict

was ordered made a part of the record by the District Court but is inexplicably absent from the record of proceedings.

Under the third question presented for review, petitioner urges that the evidence was not sufficient to support a conviction.

A writ of certiorari should be granted.

Respectfully submitted,

/s/ RICHARD J. DARKO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ———

ARCHIE JAMES SHUMAR,
Petitioner,

vs.

UNITED STATE OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition For Certiorari has been served upon the following counsel, pursuant to Rule 33 (1)(3)(b), Revised Rules, Supreme Court of the United States, by depositing three copies of the same for each counsel in the United States mail with first class airmail postage prepaid.

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Dated this day of May, 1975.

/s/ RICHARD J. DARKO

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APPENDIX

APPENDIX A

"Unpublished Order"
Not to be cited,
per Circuit Rule 28.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued June 7, 1974)

July 31, 1974

Before

Hon. TOM C. CLARK, *Associate Justice**
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. GEORGE N. BEAMER, *District Judge***

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CLAUDE W. CLARKE—No. 73-1574 THOMAS LEE BRADY—No. 73-1575 FRANK PAUL BAIRD—No. 73-1576 ARCHIE JAMES SHUMAR—No. 73-1577	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 72 CR 111 James E. Noland *Judge*

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Chief Judge George N. Beamer, United States District Court, Northern District of Indiana, is sitting by designation.

ORDER

These appeals, combined for argument, grew out of a three-count indictment against 30 defendants, of whom only five went to trial and four have appealed. Count I of the indictment was brought under 18 U.S.C. 337[1] charged a conspiracy to violate 18 U.S.C. § 1955[2], and Counts II and III are substantive offenses under § 1955 [conducting etc. an illegal gambling business]. The jury found appellants Claude W. Clarke and Archie James Shumar guilty on all three counts and appellants Thomas Brady and Frank P. Baird guilty only on Counts II and III. (Brady came clear on Count I and Baird was not charged thereunder).

Appellant Clarke was manager and 50 percent partner in a million dollar a year horse booking operation in Indianapolis. In addition, the partners operated a casino "United States Disabled War Veterans Club" in Indianapolis. Brady and Baird were salaried poker dealers at the casino and Shumar was a key account for lay-off bets placed by the booking operation.

Each of the appellants raises four points of error: (1) There was a conflict of interest present at the trial requiring severance or a change in counsel by reason of the fact that 19 of the defendants, including all 4 appellants, were represented by the same counsel at trial despite their interests being in conflict and although counsel made every effort to be relieved by the court; (2) wiretap recordings admitted into evidence should have been suppressed because the United States failed to comply with the statutory authorization requirements; and, further, because it failed to minimize interception; and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 failed to afford minimum constitutional protections; (3) Section 1955 is

unconstitutional as applied and does not afford minimum constitutional protections; and (4) the court's failure to permit the wiretap recordings already in evidence to be played to the jury on behalf of the defense. Appellants Clarke, Shumar and Brady raise a fifth point, i.e. there can be no prosecution of them under both conspiracy to violate § 1955 and for substantive violations of the same statute. We affirm the judgments as to all of the appellants on Counts II and III but reverse as to Clarke and Shumar under Count I of the indictment.[3]

1. The Conviction to Conspire Under Count I:

We do not write on a clean slate with reference to this issue. A case on all fours coming from the same District Court was decided by this Circuit on April 11, 1973 and is binding upon us. *United States v. Hunter and Hill*, 478 F.2d 1019. There, in an identical prosecution, Judge Stevens, speaking for the court, held that "a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons [the defendants] necessarily performed by the commission of the substantive offense itself." At 1026. We, therefore, reverse the judgment against appellants Clarke and Shumar on Count I of the indictment only and remand for further proceedings in accordance with this opinion.

(a) The Conflict of Interest Issue:

On October 11, 1972, Edward F. Kelly, who then represented all of the appellants, wrote to the Assistant United States Attorney prosecuting the case requesting that he be notified, "who will be testifying against whom in order that I can make immediate determination as to whether I can continue to represent that particular client." On No-

vember 13, 1972, at a pre-trial conference on the case, the Assistant raised the conflict issue and the court directed Mr. Kelly, who was individually selected by each of the appellants, to discuss the matter with his clients individually.

On November 27, 1972, pursuant to a motion by Mr. Kelly that concluded: "If in fact such conflict exists counsel . . . wishes to withdraw as their counsel in order that no prejudice will attach by reason of his continued representation", a hearing was held to determine if any conflict of interest existed. The court at this hearing admonished the appellants, collectively and individually, to pick "some other lawyer" if they had "any feeling" that they or their counsel would be "at a disadvantage or be limited in his cross-examination or during his questioning of such co-defendants . . ." Appellant Clarke stated that he had "every confidence in him (Kelly) myself" but later sought to talk with another and different counsel. The court gave his permission for both Clarke and Brady to do so. However, Brady decided to proceed as did Baird and Shumar with Mr. Kelly, their retained counsel.[4] After a two-hour recess Clarke advised the court he would proceed with Mr. Kelly. The court also inquired if each of the appellants waived their right to get other independent counsel, and each answered freely and, apparently knowingly, that they waived such right at that time. The court advised each of the appellants that any or all of them "could bring in another lawyer . . . Any defendant, including these seven (Kelly clients) here, can bring in more lawyers."

Early in the trial, which began on January 2, 1973, appellant Shumar moved for a severance of his case. In a colloquy with the court he admitted that he had not sought other counsel and that at the time of the November hearing "the conflict was stated to me, between Mr. Kelly's previous

clients that pleaded guilty, and they would testify against me. That did not bother me." He continued: "However, I see now that it does. Under the present circumstances of this trial, Mr. Kelly cannot properly defend me." The court overruled the request. None of the other appellants joined Shumar in his motion nor made any statement to the court as to their own feeling. In the first four days of the trial Mr. Kelly made three additional oral motions for leave to withdraw and on the fifth day while appellant Clarke, who had taken the stand in his own defense, was being cross-examined, he made his fourth such motion during the trial. It was denied.

It is true that the courts "indulge every reasonable presumption against the waiver of fundamental rights" *Glasser v. United States*, 315 U.S. 60, 70 (1942), but here the appellants each specifically waived such right at the hearing on November 27th, and though the court told them again and again they could have other counsel, none chose to employ any during the intervening five to six weeks between November 27th and January 2d when the trial began. The appellants' position boils down to the proposition that since Mr. Kelly represented each of the four appellants at trial, *ipso facto* there was a conflict but the cases are all to the contrary. Representation of several defendants by the same attorney is not tantamount to the denial of effective counsel, *United States v. Williams*, 429 F.2d 158, 160 (8th Cir. 1970); *Curry v. Burke*, 404 F.2d 65, 70 (7th Cir. 1970); *Walker v. United States*, 422 F.2d 374, 375 (3d Cir. 1970). As Chief Judge Swygert said in *Curry, supra*, the "mere fact an attorney represents two defendants is not *ipso factor* evidence of inadequate representation . . . the burden is on the defendant to establish by clear and convincing evidence that a conflict of interest

existed." At 67. In fact, the failure of a defendant to retain new counsel after being informed of possible conflicts of interest with his present counsel and the probability of resulting prejudice constitutes a waiver of any subsequent claims based on the possibility of conflict. *United States v. Frame*, 454 F.2d 1136 (9th Cir. 1972). Here three of the appellants did not raise the question during the trial, and the fourth did so it appears purely as a matter of trial strategy. Appellant Clarke says that after the Government's second witness began his testimony "what trial counsel had feared and what the defendants had failed to fully understand at the conflict of interest hearing, became so apparent that a conference was held at counsel table" and appellant Shumar made a motion to sever. [Clarke Brief p. 9]. However, the record shows that the Government's second witness was James Deeghan, the agent who had installed the wiretap. After he was excused, a luncheon recess was called [Tr. 182]. Upon return from the recess and outside of the hearing of the jury the defendant Walter Smith moved the court to enter his plea of *nolo contendere* as to Count I [Tr. 181-186]. It was at this point that appellant Shumar moved for the severance. [Tr. 187]. Defendant George Tomlinson, who did not appeal, was the only defendant to join Shumar's motion. On doing so, his counsel, Palmer Ward, advised the court that Tomlinson "moved to be severed, Sir, it seems to be the thing to do. I hate to be left out." The mood of the provocateur Shumar is clear: the conflict of interest claim was one of trial tactics from its inception. The indictment was returned on April 25, 1972. Mr. Kelly represented 19 of the defendants, 15 of whom pled guilty. It was not until October 11, 1972, that any mention was ever made of a conflict of interest and it was an inquiry of the Government as to what defendants who had pled guilty would testify so "I (Kelly) can make an immediate determination as to

whether I can continue to represent that particular client". After pleading fifteen of his clients guilty, he then decided to raise the question of whether "in fact such a conflict exists". The tactic was continued at the November 27th hearing. There waivers were solemnly made in open court. Some five to six weeks expired from that date to trial and still no new counsel was engaged. The tactic failed but the appellants are bound by it. *Henry v. Mississippi*, 379 U.S. 443, 451 (1968). *United States v. Radford*, 452 F.2d 335 (7th Cir. 1971).

2. We consider the remaining points together. First, it is contended that "lay-off" bettors do not come within the term "conducting" a gambling operation. However, this contention has been decided against appellants in at least two 7th Circuit cases: *United States v. McHale*, 495 F.2d 15 (1974) and *United States v. Hunter*, 478 F.2d 1019 (1973).

Next, appellants attack the authorization of the wiretaps, asserting that they were not made by the appropriate Department of Justice officials under the Act. Our study of the record, however, shows that both the Attorney General and a specifically designated Assistant Attorney General authorized the applications made to the court for the interceptions. The recent rulings of the Supreme Court outlining the procedure necessary under the Act was, therefore, fully met and the point is not well taken. *United States v. Giordano et al*, 94 S.Ct. 1820 (1974) and *United States v. Chavez*, 94 S.Ct. 1849 (1974), each of which was decided May 13, 1974. Nor is there any showing of failure to minimize the interceptions. The constitutionality of 18 U.S.C. § 1955 has been upheld in this Circuit on a like ground as here, *United States v. Hunter*, *supra*, at 1021; and by the Fifth Circuit in *United States v. Harris*, 460 F.2d 1041, cert. den. 409 U.S. 877.

The size and scope of the gambling business was developed fully in the testimony of Brown who was a partner of Clarke, one of the appellants here, in its operation. The evidence indicated that the operation was statewide with his headquarters at the East 46th Street location in Indianapolis and a casino at the Disabled War Veterans Club in the same city. The operation of the enterprise required more than five persons to "conduct, finance, manage, supervise, direct or own all or part of such business", and had been in operation for some two years, much longer than the "substantially continuous operation for a period in excess of thirty days" as well as involving "a gross revenue of $2,000 in any single day", as required by Section 1955.

The indictment includes separate substantive Counts II and III, covering a specific day of illegal gambling operation (March 18, 1972), on which at least $2,000 was generated and continuous operation of an illegal gambling business for over thirty days (March 20, 1972 through April 21, 1972), respectively. Appellant Clarke insists that these counts are multiplicitous in that the crime denounced by the statute is the conduct of an illegal gambling business and that the separate counts are merely jurisdictional elements of the same offense, only stating different means by which the offense might be committed. However, this defense was not raised in the trial court and "may not be raised for the first time on appeal." *United States v. Cassell*, 452 F.2d 533, 536 (7th Cir. 1971). In addition, the sentences on these counts were concurrent with that on Count I. The question raised is troublesome and without definitive precedent but in the light of our remand, we will follow the practice laid down in *Cassell, supra.*

Finally, the 91 wiretap tapes of 2 1/2 hours each covering all of the interceptions were made available to the de-

fense for the purpose of indicating which portions thereof were relevant. Forty-six of these tapes were introduced into evidence by the Government. However, the defense, after identifying the relevant portions of the tapes, insisted on playing the 46 complete recordings regardless of their relevance—which would have consumed an inordinate period of time of the court and jury (approximately 18 trial days) and introduced much irrelevant testimony. The court offered the playing of those portions of the tapes that were relevant which the appellants refused.

The appellant Shumar was permitted to change counsel after the argument in the case and his present counsel has filed a supplemental brief. Counsel raises two new points: (1) The sufficiency of the evidence against Shumar and (2) the introduction of evidence against him that was not relevant.

Shumar now contends that he was a mere "customer", not an employee of the gambling operation: "only a bettor and nothing else". He says that "the trial court judge assumed that the bets being placed by Defendant Shumar were 'lay-off' bets and that there was no substantial evidence . . . to indicate Defendant Shumar was laying off bets. Rather, the evidence leads to the conclusion that he was only placing his own personal bets." We find, however, that in his original brief filed on August 1, 1973, Shumar characterized the evidence against him: "All that was shown was the laying off of bets, a common bookie practice, and nothing was shown to indicate that commissions were received or that salaries were received." At p. 26. *McHale, supra*, a lay-off bettor case came down on April 8, 1974, holding: "Certainly the lay-off bettor is a more obvious target of § 1955 than runners, clerks and watchmen." At 18. Moreover, the record shows Shumar placed lay-off bets over the telephones of the gambling

operation, i.e. 80 calls over a single 30-day period; that he was known to the operation as Arch and had place "7" on the wooden rack at the gambling headquarters that listed key accounts. Certain services were furnished these accounts such as scratch information, race results, sports line information, green sheets and racing forms that would attract lay-off bets to the headquarters. The route man who serviced Shumar testified that the latter was his second largest customer for green sheets and racing forms. Shumar received each day 4 copies of the Daily Racing Form, six copies of the Illinois Sporting News (green sheet) and was allowed a 50 percent discount from his gambling operations. In addition, as Shumar's Supplemental Brief states, he was permitted to make his own closing argument to the jury "attempting to demonstrate the significant difference between himself and his co-defendants in their relationship to the gambling operation". At pp. 19-20. In the light of these considerations we cannot say that the evidence was not sufficient to support the jury's verdict.

Shumar's second new point has to do with the gambling paraphernalia etc. that was admitted into evidence at the trial. Shumar lists 13 items in his brief (p. 21) which he says should not have been admitted against him. But as this court held the other day in *United States v. Joyce, et al.* Nos. 73-1014, 73-1015, 73-1016, May 9, 1974, even where a conspiracy is not charged, conspiracy rules of evidence and accountability can be applied to a criminal scheme. At 7-8. Though we have ordered the conspiracy charge dismissed here, the evidence to which Shumar refers is and was admissible. Furthermore, all of the items to which he objects, same one (the poker chips) had to do with the main enterprise to which Shumar was closely, connected and of

which he was part and parcel. Even if there be error, it was harmless.

The judgment is affirmed as to Counts II and III and reversed as to Count I. The case is remanded for such further proceedings as are necessary to carry out the mandate of this opinion.

It is so ordered.

FOOTNOTES

1 - § 371: If two or more persons conspire either to commit any offense against the United States . . . and any one or more of such persons do any act to effect the object of the conspiracy, and shall be fined not more than $10,000 or imprisoned not more than five years or both.

2 - § 1955: (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years or both. (b) as used in this section (1) "illegal gambling business" means a gambling business which (i) is a violation of the law of a state . . . (ii) involves five or more persons . . . and (iii) has been or remains insubstantially continuous operation . . . in excess of 30 days or has a gross revenue of $2,000 in a single day . . ."

3 - Appellant Brady, as we have noted, was acquitted on Count I; nevertheless he raises the *Hunter and Hill, supra,* point. Having been acquitted, the point becomes moot; if he claims prejudice with reference to Counts II and III, which he does not articulate, we cannot see how this would be possible since he was acquitted on the Count I charge.

4 - Appellant Brady, after advising the court: "I do want him (Kelly), sir," added: "However, I do not wish to waive my right to seek other counsel. I would respectfully ask that." Appellant Shumar also advise the court. ". . . I don't know whether that is a conflict of interest or not. But I do know that I want Mr. Kelley as my attorney." Shumar also waived his right to seek other counsel "at this time". Mr. Baird answered "I do" to the court's question: "Do you want Mr. Kelly to represent you?"

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 11, 1975

Before

TOM C. CLARK, *Associate Justice**
WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **vs.** Nos. 73-1574, 1577 CLAUDE W. CLARKE ARCHIE JAMES SHUMAR, *Defendants-Appellants.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 72-CR-111 James E. Noland, *Judge.*

ORDER

The Government's petition for rehearing is granted. In view of the Supreme Court's March 25, 1975, decision in *Iannelli v. United States*, 43 LW 4423, our order of July 31, 1974, is reconsidered, and the convictions of Clark and Shumar on Count I of the indictment are affirmed.**

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** *Iannelli* clearly holds that the Government may successfully prosecute for both conspiracy to violate 18 U.S.C. § 1955 and for substantive violations of the same statute, despite Wharton's Rule.

APPENDIX C

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RULES OF APPELLATE PROCEDURE

Rule 40.

PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, a petition for rehearing shall not exceed 10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying.

Rule 41.

ISSUANCE OF MANDATE; STAY OF MANDATE

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is

shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder,

member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

APPENDIX D

CERTIFIED COPY

APPEAL FROM

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARCHIE JAMES SHUMAR, *Defendant-Appellant.*	Case No. 73-1577 Noland, *Judge*

Date	Filings-Proceedings
6/28/73	Filed original record on appeal.
6/28/73	Filed copy of this court's order of February 23, 1973 in undocketed case, entered after pre-docketing conference per FRAP 33, setting docketing and briefing schedule. (73-1574 thru 73-1578)
6/28/73	Issued cert cy order 6/28/73 to Clerk Beck. (Same #s)
6/28/73	Entered order that 5 appeals be docketed instanter. (Same #s)
6/28/73	Entered order that appellants Brady and Shumar file brief on or before July 30, 1973; counsel for appellants Tomlinson, Baird and Clare file briefs on or before Aug. 7, 1973 and that the US Atty file his brief on or before Sept. 6, 1973. (Same #s)

Date	Filings-Proceedings
7/ 5/73	Filed appearance of counsel for appellee—Stanley B. Miller, Jeffrey L. Lantz. (Same #s)
7/ 5/73	Filed O&3c of verified motion for joinder. Svc. (Same #s)
7/ 6/73	Entered order consolidating appeals. (Same #s)
8/ 1/73	Filed 25c of appellant's brief. Svc. (73-1575 thru 1577) (For Brady only 73-1575)
8/ 1/73	Filed 25 copies of appellant's brief (Archie Shumar) only—service.
10/30/73	Filed O&3c of verified motion for an ext of time to file brief of appellee for 30 additional days. (Same #s)
11/ 2/73	Entered order granting motion of 10/30/73 to and incl. Nov. 30, 1973. (Same #s)
12/ 3/73	Filed O&3c of appellee's verified motion for ext of time to file appellee's brief to Dec. 10, 1973. Svc. (Same #s)
12/ 5/73	Entered order granting motion of 12/3/73. (Same #s)
12/14/73	Filed O&3c of motion for leave to file instanter appellee's brief and appendix. (73-1574-77)
12/17/73	Filed 25c of appellee's brief and appendix. Svc. (Instanter). (Same #s)
12/17/73	Entered order granting motion of 12/14/73. (Same #s)
1/ 2/74	Filed O&3c of motion for short ext of time to file reply brief to 15 days from due date. Svc.
1/ 4/74	Entered order granting motion of 1/2/74 to and incl. Jan. 16, 1974.
4/29/74	Entered order setting appeal for oral argument on 6/7/74 at 9:30 AM. Oral argument limited to 30 min each side. (same #s)

Date	Filings-Proceedings
6/ 7/74	Heard and taken under advisement—morning session. (same #s)
6/26/74	Filed O&3c of appellant's motion to withold consideration and decision by the court—Svc.
6/26/74	Filed appearance of appellant's counsel—John P. Price & Richard J. Darko.
6/27/74	Filed O&3c of counsel for appellant's motion to withdraw as counsel—James Manahan—Svc.
7/ 1/74	Entered order granting motion of J. Manahan to withdraw as counsel, and granting motion to withold consideration and decision for 10 days to allow appellants successor counsel to petition the Court for appropriate relief.
7/15/74	Filed O&4c of appellant's petition for leave to file supplemental brief and for oral argument, tendered 25c of supplemental brief—Svc.
7/15/74	Filed 25c of appellant's supplemental brief, per order—Svc. Dist.
7/15/74	Entered order that leave be granted to file instanter the supplemental brief of appellant. Oral argument denied.
7/31/74	Entered final judgment order per Cir. Rule 28 AFFIRMING as to Counts II and III and REVERSING as to Count I. Cause REMANDED. (same #s)
8/17/74	Filed O&3c of appellee's motion to stay mandate —Svc. (73-1574)
8/20/74	Entered order staying mandate for 30 days. (73-1574)
8/26/74	Entered order ext. time for filing appellant's petition for rehearing to 9/9/74.
9/ 9/74	Filed 25c of appellant's petition for rehearing—Svc.

Date	Filings-Proceedings
9/30/74	Entered order denying petition for rehearing.
10/ 4/74	Filed O&3c of appellee's motion to stay mandate *IANELLI* v. *U.S.* by the Supreme Ct.
10/ 8/74	Filed O&3c of appellant Shumar's response in opposition to Government's motion to stay mandate.—Svc.
10/ 9/74	Entered order that counsel for the appellee file an answer to the response of appellant Shumar on or before 10/16/74—Svc. (73-1574)
10/17/74	Entered corrected order that counsel for the appellee file an answer to the response of appellant Shumar on or before 10/23/74. (73-1574)
10/18/74	Filed O&3c of appellant Shumar's motion to stay mandate as to that portion of the Court's judgment relating to counts II and III of the indictment—Svc.
10/21/74	Entered order denying motion of 10/18/74.
10/24/74	Filed O&3c of answer to response of appellant Shumar—Svc. (73-1574)
10/24/74	Filed O&3c of appellee's amended motion to stay mandate and ext. of time to petition for rehearing pending S. Ct. decision—Svc. (73-1574)
10/29/74	Entered order granting motion of 10/24/74. Appellee may file its petition for rehearing within 14 days after the Supreme Court decision. (73-1574)
11/ 4/74	Filed notice of filing petition for cert., Supreme Ct. No. 74-495.
2/27/75	Filed order from Supreme Ct. dated 2/18/75, DENYING petition for cert.
4/ 7/75	Filed 15c of appellee's petition for rehearing, dist.—svc. (73-1574)

Date	Filings-Proceedings
4/10/75	Filed 25c of appellant Shumar's objections to petition for rehearing svc.
4/11/75	Entered order per C.R. 28 granting government's petition for rehearing in view of the S.C. 3/25/75 decision in Ianelli v. US, 43 LW 4423 our order of 7/31/74 is reconsidered and the convictions of Clark and Shumar on Count I of the indictment are affirmed. (73-1574)
4/11/75	Entered order that said objections to the appellant Archie James Shumar are overruled.
4/25/75	Filed 25c of appellant's petition for rehearing, dist., svc.

A True Copy:

Teste:

/s/ M. T. MASON
M. T. Mason
Deputy Clerk of the United States
Court of Appeals for the
Seventh Circuit.